

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MARYLAND

UNITED STATES OF AMERICA,)
)
Plaintiff,)
vs.)
) CRIMINAL NO.: JKB-16-0363
GERALD JOHNSON, et al.,)
)
Defendant.)
)
_____)

Transcript of Motions Hearing
Before the Honorable James K. Bredar
Monday, October 30th, 2017
Baltimore, Maryland

For the Plaintiff:

Peter J. Martinez, AUSA
Christina A. Hoffman, AUSA

For Defendant Gerald Johnson:

Paul F. Enzinna, Esquire (By telephone)
Jeffrey B. O'Toole, Esquire (By telephone)

For the Defendant Wesley Jamal Brown:

Christopher M. Davis, Esquire (By telephone)

For Defendant Kenneth Jones:

Alan R.L. Bussard, Esquire (By telephone)

For Defendant Marquise McCants:

John R. Francomano, III, Esquire

For the Defendant Joseph Bonds:

David Solomon, Esquire (By telephone)

Christine T. Asif, RPR, FCRR
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P R O C E E D I N G S

THE COURT: Good afternoon. Be seated, please.

Mr. Martinez, you may call the case.

MR. MARTINEZ: Good afternoon, Your Honor. This is criminal case number JKB-16-363, United States versus Gerald Johnson, et al. Peter Martinez for the Government. With me is AUSA Christina Hoffman. We're here to address a motion to continue by Marquise McCants.

THE COURT: And, Mr. Francomano, you're here in person on behalf of your client.

MR. FRANCOMANO: I am, Your Honor. Good afternoon.

THE COURT: And your client is?

MR. ENZINNA: Marquise McCants, Your Honor.

THE COURT: McCants. And I have Mr. O'Toole and Mr. Enzinna on the line by telephone; correct?

MR. O'TOOLE: Yes, Your Honor. Good afternoon, sir.

THE COURT: And you're representing Mr. Johnson. And Mr. Davis, you're on the line representing?

MR. DAVIS: Wesley Brown.

THE COURT: And, Mr. Bussard, you're on the line representing?

MR. BUSSARD: Kenneth Jones, Your Honor.

THE COURT: And, finally, Mr. Solomon you're on the

1 line representing?

2 MR. SOLOMON: Joseph Bonds.

3 THE COURT: Bonds?

4 MR. SOLOMON: Yes, Your Honor.

5 THE COURT: Thank you. We're in court this
6 afternoon because evidently there was a disclosure of
7 information to defense counsel approximately is it ten days
8 ago at this point, is it -- it starts on the 18th, the first
9 disclosure is on the 20th?

10 MR. MARTINEZ: No, we received the information on
11 the 16th and disclosed it on the 18th.

12 THE COURT: On the 18th, excuse me. Okay. So 12
13 days ago information was disclosed to defense counsel to the
14 effect that Marquise McCants was overheard through electronic
15 surveillance discussing certain matters with another defendant
16 in this case, who has already pled guilty and is awaiting
17 sentencing. And the discussion went into areas that the
18 government thinks are relevant to the trial in this case. And
19 the consequence of that is that the government, at least with
20 respect to two of the statements allegedly made by Mr.
21 McCants, intends to, if permitted by the Court, introduce
22 that -- recordings of those statements and play them before
23 the jury. Is that it, Mr. Martinez?

24 MR. MARTINEZ: That's correct, Your Honor.

25 THE COURT: And then Mr. Francomano reacted to that

1 on the 29th of October by filing a motion seeking a
2 continuance of this trial, which is scheduled to begin on the
3 13th of November and is projected to last until approximately
4 the middle of January, some eight or nine weeks, probably
5 about six weeks or six weeks and a couple of days of actual
6 trial time, many interruptions because of the Court's schedule
7 and because of the intervening holidays, nonetheless, a
8 lengthy trial that has been scheduled for a long time.

9 Strikes me that there are two issues that are before
10 the Court. The first is the question of whether or not there
11 should be a postponement in light of this new circumstance.
12 The second, not necessarily to be resolved today, is the
13 ultimate admissibility of any such evidence that the
14 government has proffered here. So first things first, I have
15 reviewed Mr. Francomano's request for a continuance, does any
16 other defendant join the request for continuance or is it only
17 Mr. Francomano? On behalf of Mr. Johnson, Counsel?

18 MR. O'TOOLE: Your Honor, this is Jeffrey O'Toole.
19 Your Honor, I'm among the attorneys who have not yet received,
20 and we're getting to Mr. Martinez the hard drive to download
21 the material, I'll be delivering it to him tomorrow. I don't
22 take a position because I have not listened to the hours of
23 tapes that are apparently on this recording or intercepted in
24 the jailhouse. But it's difficult to know whether that
25 material would help us or hurt us at the moment. I think

1 we're unable to object or to join the motion for
2 continuance.

3 THE COURT: The -- what's overheard on the
4 recording, were those statements all made on the same day or
5 were they made on days immediately adjacent to each other or
6 were they made over the last year or what?

7 MR. MARTINEZ: Your Honor --

8 THE COURT: I'm asking the government counsel. Go
9 ahead.

10 MR. O'TOOLE: All right. Thank you.

11 MR. MARTINEZ: Your Honor, the two that we intend to
12 use at trial pertain to conversations, the first conversation
13 took place on September 25th of 2017, and the second took
14 place the following day, September 26th. The devices --
15 recording devices were not removed from the jail, because the
16 investigation was ongoing until October 4th. And then it took
17 the FBI, I guess it was 12 additional days to get us the
18 exported copies of the audio recordings and we notified
19 counsel. The two conversations we intend to use now were
20 September 25th and September 26th.

21 THE COURT: When did the FBI first realize what they
22 had?

23 MR. MARTINEZ: I think they understood they had
24 incriminating conversations pertaining to those two
25 individuals as they were monitoring the wire. But I think

1 that they did not want to disclose that for fear of
2 compromising the ongoing surveillance operation until they had
3 removed from the multipurpose room in CDF.

4 THE COURT: And so they held the material from the
5 25th or 26th of September until the 18th of October.

6 MR. MARTINEZ: Until the 16th, when they gave it to
7 us.

8 THE COURT: The 16th of October.

9 MR. O'TOOLE: Your Honor, could I ask Mr. Martinez
10 stand closer to the microphone. I can understand what the
11 Court's saying, but I have difficult time understanding what
12 Mr. Martinez is saying.

13 MR. MARTINEZ: Sorry. I need a taller microphone.

14 THE COURT: Do you want to be seated?

15 MR. MARTINEZ: Yes.

16 THE COURT: Pull the microphone closer. Give me the
17 sum and substance of the statements, Mr. Martinez, that you
18 think are admissible here.

19 MR. MARTINEZ: Yes, Your Honor. The first September
20 25th conversation, as the Court is aware was between Marquise
21 McCants and Norman Handy, a co-defendant in this case. And
22 most of the conversation pertained to this pending criminal
23 case. But the two or three minutes that is of greatest
24 interest to the government, and that we believe the jury
25 should hear about at trial and see, is a discussion between

1 McCants and Handy regarding the 2013 murder of Moses Malone,
2 which we allege was committed by Mr. Brown, Mr. McCants' half
3 brother and co-defendant in the case.

4 During the conversation Mr. Handy and Mr. McCants
5 discussed several things, the fact that Mr. Brown had
6 "beaten," in Mr. Handy's words and Mr. McCants's words, the
7 murder charge in state court. They discussed the additional
8 evidence that the federal government might have pertaining to
9 the murder. They discussed the fact that the government might
10 be calling witnesses to substantiate text messages in which
11 Brown disposed of the murder weapon. And it's clear from
12 those discussions, we think a jury could clearly find from
13 those discussions, A, that Mr. Brown did in fact murder Mr.
14 Malone. B, that Mr. McCants and Mr. Handy both know what was
15 done with the murder weapon. And C, that they're working
16 together in the jail to try and identify who the snitches are
17 in this particular case. So that's the key portion of that
18 recording --

19 THE COURT: Well, the last part of it is very
20 important. Let's back up for a minute, though, it's Mr.
21 McCants and Mr. Handy speaking?

22 MR. MARTINEZ: Correct.

23 THE COURT: And it would tend to inculcate Mr.
24 Brown; right?

25 MR. MARTINEZ: And Mr. Johnson, who we have alleged

1 authorized it.

2 THE COURT: Okay. So those statements would be
3 admissible against Mr. Brown and Mr. Johnson, if they were
4 co-conspirator statements.

5 MR. MARTINEZ: Correct.

6 THE COURT: That is statements made in the course of
7 the conspiracy, and in furtherance of the conspiracy. So
8 perhaps they would be admissible against Mr. McCants just as
9 his own statements or admissions. Although, I'm not sure
10 exactly what he's admitting to in describing the conduct of
11 others. We'll get to that in a minute. The co-conspirators,
12 how are these admissible co-conspirator statements?

13 MR. MARTINEZ: Well, Your Honor, they're all
14 defendants in the same case at the time the statements are
15 made, and they're discussing what the evidence is, and whom
16 the witnesses might be that the government intends to call at
17 trial. And one of the manner and means that we've alleged
18 with respect to this racketeering conspiracy is that it's a
19 rule of the gang that members aren't allowed to snitch. And
20 that the gang bands together to identify witnesses against the
21 gang, to intimidate them and to retaliate against them.

22 And so to the extent that they're talking about the
23 fact that their fellow gang member and co-defendant in this
24 case beat a murder in state court, they're trying to suss out
25 the differences in the case, including who the witnesses may

1 be. And to identify particular individuals who are named in a
2 conversation and say, I don't put it past him for testifying
3 or Wes thinks they're going to call Deandre, that's very much
4 consistent with a conspiracy that includes as a predicate
5 crime witness tampering and witness retaliation.

6 THE COURT: Well, any defendant who's preparing for
7 trial is focused like a laser beam on who's going to testify
8 at trial, so that they can be prepared to cross-examine them
9 and potentially discredit them and so forth. That's very
10 different from tampering with a witness, and obstructing
11 justice. Is there something in the statements that suggests
12 that it is more than the simple anticipation of or planning
13 for who might be testifying at trial?

14 MR. MARTINEZ: I think the context here matters,
15 Your Honor. And first of all, this is coming in the context
16 of a discussion of a witness murder. And --

17 THE COURT: So the murdered individual, Malone, was
18 a witness?

19 MR. MARTINEZ: Correct.

20 THE COURT: Okay.

21 MR. MARTINEZ: And they're talking about who the
22 witnesses that might testify about the witness murder may be.
23 To the extent that the Court's question is, are there
24 expressed statements during the recording that we need to take
25 care of so-and-so, or we need to get a green light for this

1 particular witness, there is no such expressed statement in
2 the recording. However, given the context of what they're
3 talking about, and the other gang-related activity that's
4 discussed before and after this conversation took place,
5 together with the allegations that we've made and that the
6 jury will hear about, with respect to what this gang does to
7 identify and eliminate or deal with witnesses who come forward
8 to testify about the gang, we think that a jury could draw any
9 number of inferences from the fact that this conversation took
10 place.

11 And I would add, one of the key issues that the
12 jury's going to be asked to decide at trial is to the extent
13 that Mr. McCants or others are proven to have joined an
14 agreement to be part of this racketeering enterprise, the
15 question the jury's then going to have to decide is what
16 crimes were foreseeable to them, did they agree would be
17 committed in furtherance of the enterprise, were murders part
18 of the agreement. And to the extent that you have two
19 co-defendants who weren't direct participants in this murder,
20 sitting inside the jail, talking about the intimate details of
21 the murder, including what became of the murder weapon, who
22 testified, and they name three different witnesses. I forgot
23 about the initial witness who had testified in state court.
24 This goes to the idea that this murder was committed in
25 furtherance of the gang, because all the gang members know

1 about it and how it was committed.

2 THE COURT: I don't have much quarrel with you on
3 that point. That's not my question, though. My question is,
4 how does the conversation itself further the ends of the
5 conspiracy? You were on more firm ground when you were
6 speaking earlier about some effort to intimidate or tamper
7 with witnesses, that could be continuing conspiratorial
8 activity. But mere statements that, yeah, we killed people in
9 the past, graphic, horrible statements about their -- how
10 their physiology reacted to being shot, don't necessarily
11 advance the objectives of the conspiracy; correct?

12 MR. MARTINEZ: There is a string of case law, Your
13 Honor, which deals with conversations between co-conspirators
14 where one co-conspirator is bringing another up to speed or
15 updating them as to affairs that are pertinent to the
16 conspiracy. And so to the extent that you have two gang
17 members inside the jail talking about what evidence was
18 presented against a certain gang member at one trial, how the
19 evidence might differ at an upcoming trial, and they're
20 talking about what happened to murder weapons, and yes, to
21 Your Honor's point, they're trying to identify who the
22 additional witnesses are, I think that's all part of the
23 conversation that's meant to bring a fellow co-conspirator up
24 to speed, and to identify potential witnesses who may need to
25 be eliminated because they're going to hold the fellow gang

1 member accountable for somebody being killed.

2 THE COURT: Well, I think that this is a complex
3 question. I take it you don't have transcripts yet of the
4 relevant conversations?

5 MR. MARTINEZ: Ms. Hoffman actually -- and she filed
6 a motion in limine Friday evening to admit statements by Mr.
7 Malone, the victim of the murder we have charged, pertaining
8 to the robbery and shooting that he was a victim of and was
9 going to testify about, which was motive for his murder. We
10 move to admit those under the forfeiture by wrongdoing
11 exception. But in support of her motion Ms. Hoffman did
12 excerpt a transcribed portion, the key portion of the
13 conversation between McCants and Handy regarding the Malone
14 murder.

15 THE COURT: Does it encapsulate and include all of
16 the statements that you would intend to offer, or are there
17 other statements or portions that have not yet been
18 transcribed that you have not submitted.

19 MR. MARTINEZ: I think it includes the key portions.
20 But I do think there are parts of the discussion, both before
21 and after the section she did transcribe, or had transcribed,
22 that we would want to use.

23 THE COURT: Thank you, Mr. Martinez.

24 So, Mr. Francomano, as to Mr. McCants himself, you
25 are requesting a continuance in the trial?

1 MR. ENZINNA: Correct, Your Honor.

2 THE COURT: But what about Mr. Martinez' point in
3 his written papers that the only reason that this disclosure
4 is being made so very late in the game is because it only
5 occurred very late in the game, on the 25th and 26th of
6 September, before a scheduled trial date of November 13, a
7 trial that has been scheduled for many, many months, in a case
8 that was indicted in 2016, not even this calendar year. I
9 mean, let's take the example of a defendant improvidently
10 blurts something out in the jail van on the way over to court
11 on the morning of trial and it substantially changes the
12 complexion of the government's evidence because the deputy
13 Marshal overheard it, does a defendant get a postponement of
14 his trial date because all the sudden he's made a blurt and it
15 completely changes the picture that defense counsel thought he
16 or she was dealing with to that point?

17 MR. ENZINNA: No, Your Honor. I believe that that
18 would not be a reason for a continuance. We're in a different
19 situation here. Number one, the recordings were the 25th and
20 26th of September. We did not receive them until October
21 16th. Excuse me, October 18th. That being said, Your Honor,
22 there's only two recordings, I believe, that Mr. McCants is on
23 that they're trying to use in the case coming up on the 13th.
24 The problem is it's not just a blurt or something that was
25 just said. There's 42 days of recordings that I need to go

1 through, that I need to go through with my client. Your
2 Honor, if I were to go to trial, go to my client and say, hey,
3 they have two recordings of you, don't worry about it we don't
4 need to go through the rest of this stuff, let's just go
5 through this stuff.

6 THE COURT: Let me first ask Mr. Martinez and Ms.
7 Hoffman, have you scrubbed the 42 days worth of recordings for
8 *Brady* or *Giglio* material?

9 MR. MARTINEZ: We haven't done a complete scrub,
10 Your Honor. We've reviewed the line sheets that the FBI
11 monitors prepare as they were listening to the conversations
12 in real time. We've identified as best we can at this point,
13 which conversations involved defendants in this case. It's
14 currently our understanding that the only defendants in the
15 case who were actually intercepted having conversations are
16 Mr. McCants and Mr. Handy. Other defendants in the case are
17 discussed, at least based on what the line sheet summaries
18 tell us. And many of the conversations -- which we've offered
19 to turn over, just to make sure that there's no hiding of the
20 ball and defense counsel have everything that we do -- many of
21 the conversations appear to be solely between detainees at CDF
22 who are not charged with or otherwise involved in this case.

23 THE COURT: Okay. But that doesn't mean that there
24 isn't any *Brady* or *Giglio* material in those statements. I
25 mean, you could have two individuals talking there and saying,

1 well, listen I heard that, you know, Brown didn't shoot
2 anybody.

3 MR. MARTINEZ: Your Honor's correct. And that I
4 think is in large part why we felt it was appropriate to tell
5 all defense counsel 11 days ago, you ought to have all this
6 stuff.

7 THE COURT: Yeah, but the government -- the
8 government has the first responsibility itself to examine the
9 material in its possession to see if there's anything of an
10 exculpatory or impeachment nature in it.

11 MR. MARTINEZ: We understand that, Your Honor. And
12 in that respect I suppose we're not in all that different
13 position than Mr. Francomano, in that we've got it recently,
14 we're still looking through it.

15 THE COURT: When are you going to be finished?

16 MR. MARTINEZ: That's a good question, Your Honor.
17 It is a lot of stuff. I would say if the objective of the
18 exercise were to completely scrub the recordings for *Brady* or
19 *Giglio*, it might take a couple weeks.

20 MR. O'TOOLE: Your Honor, if I could, this is
21 Jeffrey O'Toole. Before we get too far from Your Honor's
22 suggestion of the example of the blurting out on the day of
23 the trial, in that case I think Mr. McCants wouldn't have as
24 much ground for a continuance as Mr. Johnson or Mr. Brown
25 might, who weren't involved in that conversation, but who

1 might be referenced in it. So I think that the examination of
2 these tapes needs to be done.

3 THE COURT: Well, do I hear you, Mr. O'Toole, then
4 asking for a postponement of the trial?

5 MR. O'TOOLE: Well, I'm asking the Court for -- I
6 think this is all playing out -- just started to my
7 understanding yesterday because we had conversations talking
8 about this. But we may be asking for it, or a ruling by the
9 Court that this does not come in, which would be simple, I
10 suppose, and let this thing proceed as the Court has
11 scheduled.

12 MR. DAVIS: On behalf of Mr. Brown, that would be my
13 feeling with regard to the statements at the Chesapeake
14 Detention Facility. They're not statements of Mr. Brown. The
15 conspiracy has ended. They're not in furtherance of the
16 conspiracy. And these are not unusual facts that everybody
17 doesn't know about. The facts that were discussed regarding
18 Mr. Brown are facts that everybody knows about, they're in the
19 indictment, they're in the discovery, there's nothing new
20 here. Basically, you have Mr. McCants and this other fellow
21 just talking about the case.

22 If Your Honor were inclined to find that a
23 conspiracy hadn't ended, and the statements were in
24 furtherance of the conspiracy, which I don't see how they
25 could, but if he did, then I would move to exclude them under

1 403, because they're duplicative of the other evidence coming
2 in and it's going to mislead the jury. Mr. Brown had nothing
3 to do with these guys just shooting the breeze in the
4 barbershop or in the computer room at the detention facility.

5 Now, I spoke to Mr. Martinez about this over the
6 weekend. And I didn't join in the motion for a continuance,
7 because he indicated to me that those were the only statements
8 he was going to try to get into evidence. When we spoke, I
9 said fine, but I can't respond until I know what theory that
10 you're going to try to seek admission. I agree with Your
11 Honor, I think that the focus on the conspiracy ending and
12 that these statements aren't in furtherance of the conspiracy,
13 I think that's why they shouldn't come in.

14 So I'm asking that at least with respect to Mr.
15 Brown, that these statements that are also present in the
16 evidence elsewhere, not be allowed to come in through these
17 two guys talking. Because I think it's unfair to imply that
18 Mr. Brown is involved in some type of witness tampering, or
19 there's some big plot going on. Because I think it's an
20 unfair characterization to allow it to come in against Mr.
21 Brown. There's plenty of evidence elsewhere.

22 THE COURT: Well, you would agree, Mr. Davis, that
23 if there was embedded in this evidence, proof of some kind of
24 plot to try to intimidate witnesses or even just discover who
25 the witnesses were, for the purpose of intimidating them and

1 changing their testimony or eliminating the possibility of
2 their testifying, that that sort of co-conspirator statement,
3 even if made just on the eve of trial, is potentially
4 admissible against all of the defendants; isn't it?

5 MR. DAVIS: It would be, but that's not the case
6 here.

7 THE COURT: Well, that's the question.

8 MR. DAVIS: The fact --

9 THE COURT: That's the question.

10 MR. DAVIS: The fact that Wes was acquitted is public
11 record.

12 THE COURT: Right.

13 MR. DAVIS: I mean how it can be -- and the fact
14 that he suspects that a person who's -- these people are
15 identified in the indictment, these are text messages going
16 back and forth, I mean, and they're identified in the
17 discovery. Your Honor, hit the nail right on the head when
18 you said that all these defendants are focused on who's
19 testifying. What's lacking is any indication of witness
20 tampering or witness threatening.

21 And I understand that there are problems with
22 witness retaliation in Baltimore City, but there are no
23 allegations here to support Mr. Brown engaging in that conduct
24 at this point in time. And I'm not overlooking the fact that
25 the decedent here, Mr. Malone, was killed because he was a

1 witness, but I'm just saying now there's nothing to indicate
2 it other than it happened in the past. And I don't think
3 that's fair.

4 THE COURT: There's a long line of cases that
5 attempts to distinguish so-called idle chatter from true
6 co-conspirator statements made after the time when a
7 conspiracy, at least by charging, has ended. And they're
8 frequently in the context of jail conversations. It's not an
9 uncommon experience that defendants talk when locked up under
10 a false sense of privacy. So this is not unknown in the law
11 at all. It just turns on what was -- you know, was there an
12 objective, and was the conversation in furtherance of some
13 conspiratorial activity. Based on the proffers I've heard
14 from the government so far, I'm not persuaded, but I haven't
15 heard the actual testimony, I haven't heard the tapes.

16 The problem we've got is it's after 6:00 p.m. on the
17 day when the government was to disclose *Jencks*, consistent
18 with the prior scheduling order, agreement by the government,
19 and so forth. The government obviously doesn't want to
20 disclose the *Jencks* today if the trial is not going to
21 commence on the 13th of November as anticipated.

22 Mr. Martinez, I think you're in a hard spot here.
23 If you continue to push this and want to introduce this
24 evidence and try to get it in, I'll hold a hearing on that
25 question sometime in the next few days. I don't know what the

1 outcome is going to be on the question of whether or not it's
2 admissible or if it's not admissible. If I determine that it
3 is admissible, I may conclude that the defendants are entitled
4 to some postponement in order to look into the background of
5 this.

6 Mr. McCants is in the weakest position with respect
7 to that, because his client, arguably, is the whole cause of
8 sort of the emergency here by making statements at such a late
9 point. But even Mr. Francomano has a reasonably strong
10 argument in that the statements are made on the 25th and 26th
11 of September, but they're not disclosed by the FBI, even
12 though they're heard in real time, apparently, until more than
13 three weeks later, or about three weeks later.

14 As you're coming down to the wire getting ready for
15 a trial, three weeks, in that time period, that's a very
16 sensitive, significant period of time. And I'm certain the
17 government had some very hard decisions and choices to make
18 there, but they needed to make them, promptly, and go one way
19 or another on it. So that hangs out there, as a possibility.

20 I'm not going to postpone the trial tonight. That
21 means the government must disclose their *Jencks* tonight. But
22 you do it at the risk of the trial nonetheless being
23 postponed, because you are pushing the admission of these two
24 statements. Oddly, you're in the best position if I decide
25 that the statements won't come in, because then the defendants

1 have no argument for a postponement. If I decide that they
2 are admissible, or at least parts of them are, then there's a
3 serious question that has to be addressed with respect to how
4 much time defense counsel should reasonably have to meet those
5 statements.

6 I don't know the outcome of that. We'll have to
7 decide that in the context of what the whole discussion
8 reveals. But I'm sympathetic, not so much to Mr. Francomano,
9 although somewhat, but completely sympathetic to others,
10 particularly Mr. Davis, who represents Mr. Brown, because
11 evidently, it's conduct engaged in by Mr. Brown that is
12 specifically being discussed.

13 The bottom line, Mr. Martinez, is that I think you
14 have some very hard choices to make. But this is how things
15 developed. And I can't short circuit the process here to the
16 prejudice of defendants. They're entitled to the two weeks on
17 the Jencks, that's a settled question in this case, it's the
18 law of this case. So if we're proceeding to trial on the 13th
19 of November, they get the *Jencks* tonight. At the same time,
20 whether or not it's fair to go ahead with this trial as
21 scheduled, with this evidence -- new evidence being in play,
22 that's a complex question, not resolvable at this hour. It
23 may take a hearing -- it will take hearings for certain and
24 some time for the Court to reflect on it. It's a complex
25 question.

1 MR. DAVIS: Your Honor, with respect to the
2 forfeiture by wrongdoing, which is the second issue here, I
3 didn't -- I expected this. This goes to statements Mr. Malone
4 made to law enforcement prior to his being murdered. And I
5 always expected the government to move on this. Although, I
6 would appreciate if the government could tell me what
7 statements they intend to introduce, so that when I respond to
8 the motion they filed last Friday I can respond in a something
9 thorough manner. But I expected that motion to be filed that
10 is no surprise. I've seen this before.

11 THE COURT: All right. Well, that's a open question
12 still to be resolved. But I don't think there's anything else
13 for the Court to address this evening. The *Jencks* was to be
14 disclosed today. The trial has not been postponed. It could
15 be.

16 But the difficulty, Mr. Martinez, is that if the
17 trial is not postponed, but you haven't produced the *Jencks*.
18 Then the only remedy for that is to not permit you to call the
19 witnesses, an extreme one. So I can't imagine that the
20 government is going to roll the dice on the other question
21 with such dramatic potential consequences hanging in the
22 balance. It's up to you. I don't see, though, given the
23 corner that you are painted into, mostly by circumstances,
24 slightly by the FBI's late disclosure, I don't see how you
25 have the option to continue to pursue the admission of this

1 evidence. But it's not my decision, it's yours.

2 Anything else?

3 MR. BUSSARD: Your Honor, this is Alan Bussard, just
4 a scheduling question, I noticed on the Court calendar, on the
5 website, that the pretrial conference is no longer there for
6 the 3rd, this Friday. Is that going to be combined with the
7 motions hearing on the 7th?

8 THE COURT: I believe the preliminary -- the
9 pretrial conference was explicitly moved, wasn't it? I'll
10 turn to other counsel, I don't have the scheduling order right
11 in front of me. I thought it was moved until something like
12 the 7th.

13 MR. MARTINEZ: I recall Mr. Welch, when he was still
14 in the case, filing a motion asking that the conference to be
15 moved because of an obligation he had. And the Court did
16 grant that request and in an order, I believe, and our office
17 filed a notice of hearing on ECF.

18 THE COURT: Well, motions in limine get heard at
19 the -- in this courtroom get heard at the same time as the
20 pretrial conference any way, that's why all the defendants
21 have to come. So that's the pretrial conference. And we'll
22 check the order, but so there's no -- since I've got all the
23 counsel on the line and present here in court, Mr. Martinez,
24 what's that date and time?

25 MR. MARTINEZ: I believe it's November 7th.

1 THE COURT: At 10:00 in the morning.

2 Mr. Francomano, you anticipated that was not just a
3 hearing on motions in limine, but also the pretrial conference
4 in this case?

5 MR. FRANCOMANO: That's what I believe, Your
6 Honor.

7 THE COURT: Yes. That's it, Mr. Bussard, any
8 ambiguity about that?

9 MR. BUSSARD: Not at all. Thank you, Your Honor.

10 MR. SOLOMON: Your Honor, this is -- I'm sorry to
11 interrupt, this is David Solomon on behalf of Joseph Bonds.

12 THE COURT: Speak up, Mr. Solomon.

13 MR. SOLOMON: I'm sorry, this is David Solomon for
14 Joseph Bonds, for whatever reason I've been out of the loop on
15 a number of these scheduled hearings. So I didn't even have
16 on my calendar the pretrial conference for November 7th. Am I
17 to understand that November 7th at 10:00 o'clock will be a
18 pretrial conference as well as motions in limine?

19 THE COURT: Yes, and the number of -- there are
20 dates, I think your jury instructions, motions in limine, all
21 the normal things that you're familiar with, Mr. Solomon, from
22 cases that you've tried before me in the past, that all came
23 to pass perhaps last Friday. What was the deadline.

24 MR. SOLOMON: Okay. Well, that's fine. I mean, I
25 just want to be clear for scheduling purposes. That's fine.

1 I have nothing further.

2 THE COURT: We're going to consult the scheduling
3 order.

4 MR. MARTINEZ: Your Honor, while that's being done,
5 could I make a proposal regarding the situation the government
6 is in, in light of the Court's analysis of the issue we're
7 confronting today. It is, as Your Honor described, a highly
8 difficult situation to choose between using evidence that we
9 believe is of significant probative value to a substantive
10 offense and an overt act, in furtherance of a RICO case, that
11 is probably the centerpiece of our case on the one hand, and
12 making sure that our witnesses are not exposed for any longer
13 than necessary on the other. That's a very difficult --

14 THE COURT: It's a terrible problem.

15 MR. MARTINEZ: -- spot to be put in. And what I'm
16 proposing to the Court is whether it's possible to fashion
17 some kind of intermediate compromise whereby the trial date is
18 postponed for ten days or so, so that we can fully litigate
19 the admissibility issue before *Jencks* goes out, thereby
20 preventing us from disclosing witnesses without knowing
21 whether a postponement will be granted.

22 THE COURT: Well, the problem is I've got five
23 defense attorneys in this case, all five of them with busy
24 practices, many before this court. You know, what gets
25 delayed on the front end has to be filled in on the back end.

1 What you're basically saying is you would prefer to give up
2 the last two weeks of November, and instead have this trial
3 occupy the last two weeks in January on the back end? That's
4 what it would take.

5 MR. MARTINEZ: I think under the circumstances,
6 yes.

7 THE COURT: Okay. Well, the problem is -- Mr.
8 Francomano, are you available the last two weeks in January?

9 MR. FRANCOMANO: I would have to check, Your
10 Honor.

11 THE COURT: Mr. --

12 MR. O'TOOLE: Your Honor, if I can just tell the
13 Court, as long as he's checking, I start a trial in Nashville,
14 Tennessee, two and a half years waiting for the trial. And
15 I've tried to assure the Court when we scheduled that case
16 that we would be done with this case, when I thought that it
17 would be done.

18 THE COURT: That's Mr. O'Toole speaking?

19 MR. O'TOOLE: Yes, it is, Your Honor. Thank you.

20 THE COURT: All right. Mr. Davis?

21 MR. DAVIS: I'm trying -- it will not -- as long as
22 I finish by the second week of February, I'm okay.

23 THE COURT: Okay. Mr. Bussard?

24 MR. BUSSARD: Your Honor, I believe I am available,
25 because I -- a client pled out. I was to start a trial at the

1 end of January, but I am now available.

2 THE COURT: Mr. Solomon?

3 MR. SOLOMON: Your Honor, I have five matters in the
4 last two weeks of January specially set, but if the court will
5 provide something in writing to the effect that we have --
6 trial dates had to be changed for, you know, various reasons,
7 I can probably convince the administrative judges in different
8 jurisdictions to postpone cases.

9 THE COURT: Mr. O'Toole, Mr. Enzinna's also prepared
10 on this case, is he not?

11 MR. O'TOOLE: Yes, Your Honor.

12 THE COURT: So what would the prejudice be to your
13 client if this trial were to run over, what's it scheduled end
14 date right now, about the 11th of January?

15 MR. MARTINEZ: I believe the 12th.

16 THE COURT: 12th of January.

17 MR. O'TOOLE: I thought it was the 11th, I think the
18 answer is there's probably a reason that I'm still in the
19 case, the 4th Circuit says you keep two attorneys. I'm not
20 here as a potted plant. I think that I'm important for the
21 scheduling of the case.

22 THE COURT: On the strength of the rather dubious
23 ruling from the circuit that two counsel should remain in a
24 capital case, it's no longer a capital case, but we do still
25 respect that ruling, even though the underpinning for it seems

1 to have demoted long ago. Well, Mr. Martinez, I've got one
2 lawyer and perhaps Mr. Francomano, who hasn't responded yet,
3 that would have a problem.

4 MR. MARTINEZ: Well, Mr. Francomano's the one asking
5 for a continuance. And I certainly respect that, you know,
6 defense counsel have schedules and that they should weigh in
7 the balance, but I also think the interest of the government
8 using evidence that it believes is highly relevant and
9 probative -- we haven't even gotten to the second statement --
10 and while at the same time trying not to expose witnesses
11 before it's absolutely necessary and before we know that a
12 postponement will or won't be granted also weigh in the
13 balance. And so under the circumstances, I think rather than
14 putting us to a Hobson's choice, a short continuance is a fair
15 and reasonable intermediate compromise.

16 THE COURT: But no one would project with a, say,
17 ten day or two-week postponement, that we would have the trial
18 finished by the 23rd of January; right?

19 MR. MARTINEZ: I don't want to promise that it would
20 go that quickly.

21 THE COURT: I understand.

22 MR. MARTINEZ: But we're here on a defense motion
23 for continuance, and counsel were all willing to continue it
24 before the Court indicated where it was going. And now when
25 we're in the spot where we have to --

1 THE COURT: I never heard Mr. O'Toole say he was
2 prepared to accept a continuance under any circumstances. And
3 I think defense counsel have been very forthright, if they
4 were just laying in the weeds and raising false issues you
5 would have had Davis, Bussard, Solomon, Enzinna, and
6 Francomano, every one of them would have had impossible
7 calendars the last three weeks of January, these are officers
8 of the Court.

9 MR. MARTINEZ: Your Honor, just a few minutes ago --

10 THE COURT: They didn't responds that way. All
11 these lawyers have indicated that, you know, they could
12 accommodate the -- exactly the extension you're requesting.
13 So I don't think that if there was any kind of criticism
14 intended or directed at defense counsel, in terms of
15 strategizing here, that would be out of bounds here. And I
16 don't -- but at the same time, I don't see a hint of it.

17 MR. MARTINEZ: Your Honor, just a few -- Mr. O'Toole
18 didn't indicate that he was in favor of the continuance, just
19 a few minutes ago you asked him do I understand you to be
20 arguing for a continuance.

21 MR. O'TOOLE: Please step to the microphone, Mr.
22 Martinez, this sounds important and I can't hear you.

23 MR. MARTINEZ: I'm right in front of the microphone.
24 And I was just saying a few minutes ago, Mr. O'Toole, when you
25 spoke up it was going to take some time to scrub the universe

1 for *Brady* and *Giglio*, Judge Bredar responded by asking Mr.
2 O'Toole, do I now understand you to be asking for a
3 continuance? And you said, well, Your Honor this is a fluid
4 situation and we're reacting to the information as it comes to
5 us, or something to that effect, but at that point it did seem
6 to me that you were --

7 THE COURT: You can stop, Mr. Martinez. I'm not
8 going to hold Mr. O'Toole to a standard where he's thinking on
9 his feet in a court hearing that is evolving in front of all
10 of you as it's evolving in front of me. I don't find anything
11 sneaky about what Mr. O'Toole did. I think -- tell me the
12 name of the case in what is it, the Middle District of
13 Tennessee?

14 MR. O'TOOLE: My client is Raphael Leavell,
15 L-e-a-v-e-l-l, and the judge is Judge Sean Cox, he is -- Judge
16 Cox specially assigned to the case from Detroit, Michigan.
17 The Judge Sharp, who retired, chief judge, Judge Cox took over
18 all of his calendars. This case has been set now for a long
19 time. And I told him, you know, very emphatically when we set
20 that trial date when this case was scheduled and how long I
21 thought it was going to take.

22 THE COURT: How long is that trial scheduled to
23 last?

24 MR. O'TOOLE: That trial shouldn't take more than
25 ten days, I think that's going to be a fairly short trial.

1 And it's conceivable when they set that trial, they offered us
2 January 30th as opposed to January 23rd. I mean, tomorrow
3 morning I can call Judge Cox and see if all parties can be
4 available ten days or two weeks later. I'm not trying to put
5 anybody in a bind, I'm just trying to answer the Court's
6 question about our scheduling and that's my calendar. I think
7 it would be wrong not to tell you that. But I'll be happy to
8 try to get Judge Cox TO work with you or perhaps you could get
9 him to work with you to make my availability possible for
10 everybody.

11 THE COURT: Tell me the name of the judge again.

12 MR. O'TOOLE: Judge Sean, S-e-a-n, Cox, C-o-x. He's
13 out of Detroit, but the case is in Nashville.

14 THE COURT: And what's the charge?

15 MR. O'TOOLE: Murder, the case number is
16 3:14-0200.

17 THE COURT: Okay. Mr. O'Toole, hold on a second. 3
18 colon, 14 what?

19 THE COURT: Dash 0200.

20 THE COURT: Okay. Judge Sean Cox and the
21 defendant's --

22 MR. O'TOOLE: My client -- I'm sorry, Your Honor.

23 THE COURT: Is it a multidefendant case?

24 MR. O'TOOLE: It was until recently when the judge
25 severed the cases. The brother is going to trial in a week.

1 And then our trial is to follow on January 23rd.

2 THE COURT: Okay. And your client's name is.

3 MR. O'TOOLE: Raphael Leavell, L-e-a-v-e-l-l.

4 THE COURT: Spell the last name again for me?

5 MR. O'TOOLE: L-e-a-v-e-l-l.

6 THE COURT: V as in victor?

7 MR. O'TOOLE: L-e-a -- yeah, l e a, victor, e-l-l.

8 THE COURT: Leavell.

9 MR. O'TOOLE: Leavell.

10 THE COURT: And what's the charge?

11 MR. O'TOOLE: The charge is murder. It's a Hobbs
12 Act murder.

13 THE COURT: Hobbs Act murder.

14 MR. O'TOOLE: Correct.

15 THE COURT: Okay.

16 MR. O'TOOLE: He had a co-defendant, was his brother
17 Quenton he's going to trial I think in less than a week.

18 THE COURT: Right. All right. The government is
19 relieved of the obligation from releasing the *Jencks* tonight,
20 even though the trial schedule is still as it is. We start on
21 November 13th. Pull up the calendar for tomorrow morning.
22 What have we got tomorrow morning?

23 THE CLERK: Nothing.

24 THE COURT: So we'll reconvene on this matter at
25 11:00 a.m. tomorrow morning. Government available?

1 MR. MARTINEZ: Yes, Your Honor.

2 THE COURT: Mr. Francomano?

3 MR. ENZINNA: I will, be Your Honor.

4 THE COURT: Mr. O'Toole, Mr. Enzinna?

5 MR. O'TOOLE: Your Honor, I'd ask Mr. Enzinna to
6 stand in for me if I could. I'll be at a State Department
7 meeting with Mr. Tillerson in the morning at 9:30 to 11:00.

8 THE COURT: Okay. Mr. Enzinna, you can cover? Mr.
9 Enzinna, you can cover? Mr. O'Toole, do you believe Mr.
10 Enzinna can cover?

11 MR. ENZINNA: Your Honor, I am here and I can cover.
12 I apologize.

13 THE COURT: Yes. Mr. Davis.

14 MR. DAVIS: Yes. That's 1:00 p.m. tomorrow?

15 THE COURT: 11:00 a.m.

16 MR. DAVIS: 11:00 a.m. Yes, I can be there.

17 THE COURT: Mr. Bussard?

18 MR. BUSSARD: I can be there, Your Honor.

19 THE COURT: Mr. Solomon?

20 MR. SOLOMON: Your Honor, I have a detention hearing
21 before Judge Gesner at 11:00, but it shouldn't be a long
22 matter.

23 THE COURT: At what time?

24 MR. SOLOMON: 11:00.

25 THE COURT: Okay. Just call in there tomorrow

1 morning, Mr. Solomon, explain the situation and get that
2 moved.

3 MR. SOLOMON: The detention hearing, that's fine.
4 Okay.

5 THE COURT: Yes. And Mr. Francomano.

6 MR. FRANCOMANO: Yes, Your Honor. I'll be here.

7 THE COURT: Counsel have the option of either
8 appearing in person or by telephone.

9 Mr. Enzinna, are you going to be here in person or
10 by phone?

11 MR. ENZINNA: I'll be on the phone, Your Honor.

12 THE COURT: Mr. Davis?

13 MR. DAVIS: I prefer to be on the phone, if I can,
14 it's much more efficient.

15 THE COURT: Mr. Bussard.

16 MR. BUSSARD: I will try to be in court, Your
17 Honor.

18 THE COURT: Mr. Solomon?

19 MR. SOLOMON: I'll be there.

20 THE COURT: Mr. Francomano?

21 MR. FRANCOMANO: I'll be here in court.

22 MR. O'TOOLE: Your Honor, if I could -- Your Honor,
23 this is Mr. O'Toole, if I could, if I'm back from the State
24 Department I would like to join as well. Thank you.

25 THE COURT: Absolutely. Mr. Martinez and Ms.

1 Hoffman, you can be here in person?

2 MR. MARTINEZ: Yes, Your Honor.

3 THE COURT: Okay. Very good. So the objective will
4 be to -- for the Court to confer with Judge Cox before the
5 11:00 tomorrow morning, to see if we can secure a January 30
6 trial start date for Mr. O'Toole, or later, but January 30.
7 If we accomplish that, that will give us the space to afford a
8 two-week postponement of this trial.

9 Now, we start running into the Court's other
10 problems, though, I don't have the schedule immediately in
11 front of me. Let's see. When did I advise all of you that I
12 would be unavailable in December, is that the --

13 MR. BUSSARD: The 11th to the 15th, Your Honor.

14 THE COURT: That's right. So we would essentially
15 pick the jury, and have a week of trial. And then there would
16 be a week of no trial. And then we would pick up with the
17 schedule previously set. Is that it?

18 MR. O'TOOLE: Your Honor, did I just hear you say
19 you were going to call Judge Cox or you wanted me to call
20 Judge Cox?

21 THE COURT: I will call Judge Cox.

22 MR. SOLOMON: Your Honor, this is David Solomon
23 again, I'm sorry, did I hear you correctly when you're saying
24 that the last two weeks of November would put perhaps -- would
25 be days that we don't sit?

1 THE COURT: Well, the trial may not -- the trial,
2 under this scenario, would not start until Monday the 27th of
3 November. I mean, it's all kinds of logistical problems are
4 generated, the jury notices have already gone out, the Court
5 has a full calendar in the second two weeks -- or in the
6 latter two weeks of January, probably in the neighborhood of
7 20 to 30 matters that have to be rescheduled. I mean, it's an
8 enormous problem. I'm trying my hardest to find a middle
9 ground that will work and protect all of the defendants'
10 rights in this situation. I am not by any means at this point
11 ruling that we are postponing this trial. Not even close.
12 I'm just carving out different possibilities. I'll make my
13 ruling tomorrow in that regard.

14 MR. SOLOMON: Well, Your Honor, I'm sorry, I just
15 wanted to preface what I say letting the court know that I
16 wasn't there for the motion hearing when apparently the trial
17 schedule was verbalized. I have two medical days on the 28th
18 and 29th of November where I must be out for a battery of
19 tests and medical procedures. And I can't -- I just can't do
20 anything about that. So I just wanted to put the Court on
21 notice.

22 THE COURT: Mr. Solomon, I believe that very
23 recently I issued a paperless order in this case that set out,
24 with great precision, every single day that the Court was
25 going to sit and not going to sit between November the 13th --

1 I thought it was the 11th of January, Mr. Martinez corrects me
2 says it was the 12th of January, that every single day, every
3 Friday, every date in relation to the Christmas holiday, and
4 am counting on that, and explicitly advised the government in
5 particular to tell the Court if six weeks of trial time was
6 going to be insufficient to get this done. And the government
7 did not come back with a response to that, which I took to
8 indicate they thought they could get it in. But taking away
9 even two days is potentially problematic.

10 MR. SOLOMON: Well, perhaps what the government can
11 do then, assuming I'm in trial at that point, is avoid calling
12 witnesses that implicate my client and have somebody just
13 stand in for me on those two days.

14 THE COURT: No, I'm not going to do that. I guess
15 the way I can look at it is that based on Mr. O'Toole's
16 schedule, I've got until the 20 -- till the 20th of January.
17 Friday, is that a Friday?

18 MR. MARTINEZ: That looks like a Saturday, Your
19 Honor.

20 THE COURT: So the 19th. If we go forward on the
21 13th of November, based on everything that has just been said
22 during this hearing, all counsel should understand that the
23 trial window is now November 13 until November 19 -- until
24 January 19. No one had an objection to that. So that's the
25 new trial window. Accordingly, Mr. Solomon, while I'm

1 frustrated with the fact that you didn't point out these two
2 medical dates previously, I know what you've been dealing with
3 and we're going to accommodate those two dates. What are
4 they, the 28th and 29th?

5 MR. SOLOMON: 28th and 29th, yes.

6 THE COURT: 28th and 29th.

7 MR. SOLOMON: Thank you, I appreciate that.

8 THE COURT: Mr. Jaco, you have that?

9 THE CLERK: (Indicating.)

10 THE COURT: All right. The government hasn't lost
11 any trial days as a result of Mr. Solomon's needing to be out
12 on those two dates, agreed Mr. Martinez?

13 MR. MARTINEZ: Agreed.

14 THE COURT: In fact, if anything you picked up two
15 days. I think that the government needs to think long and
16 hard about how essential this additional testimony is, the
17 bind that it places the Court in, all parties, the impact on
18 the public in terms of delaying -- completely redoing the jury
19 notices. The impact on other litigants, including your own
20 office in terms of proceedings in late January, and by
21 tomorrow morning be ready to state what your position
22 ultimately is with respect to that question. 11:00 o'clock
23 tomorrow.

24 Anything else, Mr. Martinez?

25 MR. MARTINEZ: Not at this time Your Honor.

1 MS. HOFFMAN: Your Honor, I do have one question.

2 THE COURT: Yes, ma'am.

3 MS. HOFFMAN: Would you like us to litigate the
4 admissibility of the statements tomorrow morning at 11:00?

5 THE COURT: I suppose it would be useful if you were
6 ready to do that, but I'm not certain yet whether I'll be in a
7 position to do that, or whether defense counsel will be.

8 MR. ENZINNA: Your Honor, I will not be able to do
9 that by tomorrow at 11:00.

10 THE COURT: Okay. Well, I understand your position.
11 11:00 o'clock tomorrow. We're in recess.

12 (The proceedings were concluded.)

13 I, Christine Asif, RPR, FCRR, do hereby certify that
14 the foregoing is a correct transcript from the stenographic
15 record of proceedings in the above-entitled matter.

16 /s/
Christine T. Asif
17 Official Court Reporter
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